

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

PAUL PEASLEE and
MARY LOUISE PEASLEE,
Husband and Wife,

Plaintiffs,

v. CIVIL ACTION NO. 1:10CV105

KAWASAKI MOTORS CORP., USA,
a foreign corporation,

Defendant.

TRANSCRIPT/MOTION HEARING/TELEPHONIC
August 3, 2010, at 2:00 p.m.
Clarksburg, West Virginia

BEFORE: JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:
For Plaintiff:

C. PAUL ESTEP, ESQ.
Estep & Shaffer, LC
212 W. Main Street
Kingwood, WV 26537

For Defendant:

CLEM C. TRISCHLER, ESQ.
Pietragallo, Bosick & Gordon, LLP
One Oxford Center, 38th Floor
301 Grant Street
Pittsburgh, PA 15219

Proceedings recorded by electronic sound recording, transcript
produced by official court reporter.

SUE HATLEY, CCR
OFFICIAL U.S. COURT REPORTER
P. O. BOX 1518
ELKINS, WEST VIRGINIA 26241
(304) 614-3694
(Call to Order of the Court)

1

EXHIBIT

tabbles

C

1 THE COURT: Good afternoon.

2 MR. MARRION: Your Honor, this is Jim Marrion, I have
3 Plaintiffs' counsel and Kawasaki's lead counsel holding on the other
4 end. I am doing this from my office in Pittsburgh because Kawasaki's
5 trial counsel is in – out-of-state in Texas on another matter, so I was
6 the one trying to get everyone together. So if you don't mind, I'll try
7 to get the other two gentlemen on the phone.

8 THE COURT: That will be fine.

9 MR. MARRION: Thank you, sir. Thank you, Your Honor,
10 appreciate it.

11 Is Paul and Clem on the line?

12 MR. ESTEP: Yes, sir, I am, Paul is.

13 MR. TRISCHLER: Yes, we are.

14 THE COURT: All right. Is this Paul Estep?

15 MR. ESTEP: Yes.

16 THE COURT: And you are Plaintiffs' counsel?

17 MR. ESTEP: Yes, sir.

18 THE COURT: And the other gentleman is –

19 MR. TRISCHLER: My name is Chem Trischler, Your Honor, T-
20 r-i-s-c-h-l-e-r, representing Kawasaki Motors Corp.

21 THE COURT: Very good, sir, thank you. This matter is
22 coming on telephonically today by Order of the Court. It bears Civil
23 Action No. 1:10CV105. It is a case brought by Paul Peaslee and Mary
24 Louise Peaslee against Kawasaki Motors Corp., USA, a foreign
25 corporation.

1 Specifically, before the Court today is Defendant's Motion for a
2 Protective Order, Docket Entry No. 11 and the Response to that Docket
3 Entry No. 11, which bears Docket Entry No. 12.

4 I have read both the Motion for Protective Order and the
5 Response as well as the medical report or medical letter to the
6 attorneys of record signed by Dr. John J. Keefe, K-e-e-f-e.

7 Does the Defendant desire the Court to have anything in addition
8 to that which it has supplied in its Motion for Protective Order?

9 MR. TRISCHLER: May it please the Court, Your Honor, thank
10 you for your time and prompt consideration of this Motion for
11 Protective Order. On behalf of the Defendant, Kawasaki Motors
12 Corp., I do not have anything additional in the way of documentation
13 to submit to the Court in – in consideration of our Motion for
14 Protective Order. I do think that there are a couple of basic points, if
15 the Court is inclined to hear argument, that I'd like to simply bring to
16 the Court's attention.

17 THE COURT: Sure. Go ahead, Mr. --

18 MR. TRISCHLER: That we can amplify what we have already
19 submitted as opposed to, I think the Court's immediate question,
20 whether we had anything else in particular to submit.

21 THE COURT: Go ahead, Mr. Trischler.

22 MR. TRISCHLER: Thank you, sir. Certainly, neither I nor
23 my client is unsympathetic to – to Mr. Peaslee's medical condition but
24 I would submit to the Court that I believe the Motion for Protective
25 Order that we filed is one of fundamental fairness. What the Plaintiff

1 seeks to do through this deposition that I believe has been noticed in
2 violation of the Federal Rules of Civil Procedure, is to preserve
3 testimony on this Friday and to create trial evidence in a way that's
4 unfairly prejudicial to Kawasaki.

5 First and foremost, it's unfairly prejudicial because I am trial
6 counsel for Kawasaki and I am simply unavailable on the 6th. I have
7 longstanding professional commitments to other clients this week. I
8 am in Texas at the moment and will be in Connecticut on Friday, and I
9 have relayed those to Mr. Estep. But as of this moment, he is
10 insisting on proceeding on the 6th and by proceeding on the 6th, he is
11 intending to proceed at a time when the Defendant has absolutely— this
12 is a product liability case and the Defendant has absolutely no
13 information regarding the maintenance and use history of this machine.
14 We have no information regarding the identify of eyewitnesses, if any.
15 We have no information regarding the injuries and damages being
16 claimed by the Plaintiffs as a result of this incident beyond that which
17 is alleged in the Complaint. We have no information regarding the
18 circumstances of the accident beyond that which is alleged in the
19 Complaint and we don't even have the benefit of the Rule 26(a) initial
20 disclosure that I think we should be ordinarily entitled to.

21 I began my statement to the Court by indicating that I am not
22 unsympathetic to Mr. Estep's plight and the condition of his client and
23 I believe, I have made a very fair proposal that would allow him to
24 preserve testimony but at the same time getting the – the information, I
25 think I need to conduct a cross-examination. And essentially, what I

1 asked for was simply that the deposition be pushed back a few days to
2 a time when I am available that the Plaintiffs before –

3 THE COURT: What was your recommendation relative to a
4 few days?

5 MR. TRISCHLER: I – the day I recommended, sir, was eight
6 o'clock the 14th of this month. August 14th, so I ask that it be moved a
7 period of eight (8) days. The – in that interim, I was – had asked that
8 the Rule 26 – Plaintiff's Rule 26(a) disclosure be filed so that we
9 could have accident reports, medical records, things of that nature.
10 We – we have already done a lot of work to try to line up an inspection
11 of the vehicle which my expert will be doing on the 6th. I will not be
12 there, of course, but my expert is doing it because I am having him try
13 to get there as quickly as possible so that we could be in a position to
14 cross-examine. And I, also, ask for a brief discovery deposition that I
15 – what I had envisioned was if we can agree on an alternative date, be
16 it the 14th or some other date that I could conduct a two hour discovery
17 deposition in the morning certainly sensitive to Mr. Peaslee's stamina
18 and his ability to respond to questions at whatever time he needs. But,
19 just a few hours so that I could find out what it is he knows about or
20 recalls about the circumstances of the accident, so that I then have
21 some fundamental base of information upon which to prepare a cross-
22 examination that we could conduct later in that day after the witness
23 has sufficiently rested.

24 My thought was that that proposal was a fair balance in terms of
25 the Plaintiffs' need for the testimony and their understandable right to

1 preserve it with the Defendant's fundamental right to conduct a cross-
2 examination that is a meaningful one, sir. And that – I – we made
3 that proposal, it was rejected by the Plaintiffs and hence that's what
4 led to the Motion for Protective Order.

5 And as I said, I think that if – I would hope that the Court would
6 be understanding of the Defendant's position, that if this is going to be
7 trial testimony that we are confronted with before there has been any
8 pretrial disclosures before there has been a Rule 26 "meet-and-confer"
9 conferences, that there has to be some concessions given to the
10 Defendant so that they can conduct a meaningful fair cross-
11 examination. And that's what I'm looking for through this motion
12 which, unfortunately, we were not able to resolve amongst ourselves.

13 THE COURT: All right, thank you, Mr. Trischler. How
14 about you, Mr. Estep?

15 MR. ESTEP: Your Honor, I'd like to point out that what the
16 Defendant seeks to do is to delay this preservation deposition until it's
17 simply too late. And I'm sorry, to inform the Court that that may
18 have already happened. I visited with Mr. Peaslee this morning and
19 his condition has deteriorated remarkably even since the last time I
20 saw him. As of this morning, he was unresponsive and probably
21 already not able to give testimony. We are hopeful that he will rally,
22 that he will regain some of his consciousness and be able to give
23 testimony in the next few days, although, that's certainly in doubt.

24 What Mr. Trischler seeks is – is more time and nobody would be
25 happy to give Mr. Peaslee more time, nobody would be happier about

1 that than I. But, unfortunately, this man doesn't have another few
2 days and I'm not sure he has until Friday to be honest about it.

3 All I am seeking to do is to preserve Mr. Peaslee's testimony and
4 for some reason Mr. Trischler insists upon resisting the preservation of
5 that testimony.

6 THE COURT: Well, wait a minute –

7 MR. ESTEP: His testimony won't be –

8 THE COURT: Now, wait a minute!

9 MR. ESTEP: – held –

10 THE COURT: Counsel, counsel, wait a minute! I – I didn't
11 hear that and I don't think this is about counsel trying to prevent you
12 from preserving Mr. Peaslee's testimony. There were some issues
13 that he raised and they were legitimate issues. Whether or not they
14 can cause the Court to delay the taking of the deposition until next
15 week, that hadn't been decided yet.

16 Now you tell me that as of this morning your client was
17 unresponsive. You were in his house?

18 MR. ESTEP: I was, Your Honor, yes.

19 THE COURT: And his house is in Kingwood?

20 MR. ESTEP: Yes, Your Honor, it is.

21 THE COURT: And my understanding from the doctor was, that
22 he was being medicated but at the time his doctor wrote his letter, that
23 he was lucid and capable of making, in the doctor's opinion, a
24 deposition.

25 MR. ESTEP: That's true. And the doctor was hopeful that he

1 would be for a period of two weeks.

2 THE COURT: But would not guarantee that?

3 MR. ESTEP: But would not guarantee that, yes.

4 THE COURT: Now when you say unresponsive, be specific.
5 What did you observe that led you to make the statement that “your
6 client this morning was unresponsive”.

7 MR. ESTEP: Your Honor, I am not sure that he knew who I
8 was. I walked in and – and greeted him. He mumbled his responses
9 and it wasn’t at all clear to me that he would even recognize who I
10 was. He wasn’t able to give meaningful answers to any questions as
11 simple as – as “good morning, how are you”. He was – he was really
12 in rough shape and he’s on – I also point out that he’s, I think just
13 over the weekend been put on Morphine twice daily which is a new
14 development.

15 THE COURT: And that’s a condition that was in existence at
16 what time this morning?

17 MR. ESTEP: Oh, I was there at about 10:00 a.m. or so.

18 THE COURT: Did his condition improve any during the
19 period of time you were there?

20 MR. ESTEP: No, no. I was only there a few minutes and I
21 didn’t want to disturb him. I was told by the family that as of
22 Saturday, his condition was fairly good and that he was able to – to
23 conduct some of his own business affairs. Some important matters that
24 he was able to take care of reasonably well and that his condition
25 deteriorated then Sunday and Monday.

1 THE COURT: Are you –

2 MR. ESTEP: Hopeful that – that it may come back and it just
3 be a setback from which he – from which he is able to rally but we
4 don't know that.

5 THE COURT: What – let me look at something here just a
6 second, please.

7 MR. ESTEP: He's also –

8 THE COURT: This says he has metastatic lung cancer. Do
9 you know where it has metastasized to?

10 MR. ESTEP: It's everywhere. It metastasized first to his – to
11 his liver, I think and since then it's just spread all throughout his body
12 and that happened fairly quickly. I mean, we – we didn't know about
13 the diagnosis until – just until recent weeks.

14 He is now under 24 hour --

15 THE COURT: What!

16 MR. ESTEP: – care including Hospice Care.

17 THE COURT: Is he under Hospice Care now?

18 MR. ESTEP: He is. Yes, Your Honor.

19 THE COURT: Mr. Estep, where are you with respect to ability
20 to make your – the accident report and other things that might be a
21 part of the 26 disclosure. Where are you with respect to that?

22 MR. ESTEP: I have already consulted an expert some weeks
23 ago. I don't have the report yet but I would expect to have it within
24 days, hopefully, and I may well be able to have it prior to the – prior
25 to the planned deposition.

1 THE COURT: Well, but what about – was there an accident
2 report conducted by the police or anything?

3 MR. ESTEP: No, it happened on private property so there was
4 nothing other than an EMS report, which I can provide that. I have
5 accumulated some 1500 pages of medical records just from this
6 accident, which I have. I received back from a copying service today
7 and can provide to Mr. Trischler by overnight mail, if necessary. But,
8 there is no police report.

9 THE COURT: All right. So you've got – let me make sure I
10 understand this. You have medical records, you have an EMS report?

11 MR. ESTEP: Yes.

12 THE COURT: Do you have any family that were witnesses?

13 MR. ESTEP: No, no. Well, there was – there was a brother
14 who showed up at the scene and found him after the accident. He
15 didn't actually see the accident. He was a witness to the aftermath.
16 We have some fire department folks that showed up when the EMS was
17 called.

18 THE COURT: Do you have their identities?

19 MR. ESTEP: We do.

20 THE COURT: Do you have addresses and telephone numbers?

21 MR. ESTEP: We do. And if we don't, we can get them.

22 THE COURT: How's that?

23 MR. ESTEP: We do, Your Honor, and if there are some that
24 we are lacking, I'm sure we can get them very easily, it's a small town
25 and we're familiar with most of them. But, I think we already do have

1 them all, yes.

2 THE COURT: All right. What else do you have that pertains
3 to the claims that have been made in this civil action?

4 MR. ESTEP: The only other thing I have is the Kawasaki
5 Mule that we believe caused the accident.

6 THE COURT: But they are –

7 MR. ESTEP: Offered Mr. Trischler to – to view, to look at,
8 to have his expert look at any time he wants.

9 THE COURT: That's been seen – being seen this Friday at
10 what time?

11 MR. ESTEP: I believe at 10:00 a.m.

12 THE COURT: And where is it located?

13 MR. ESTEP: It's located here in Kingwood, not more than a
14 mile from my office.

15 THE COURT: All right. Now with respect to the deposition,
16 you filed a notice with respect to this deposition, did you?

17 MR. ESTEP: I did, Your Honor.

18 THE COURT: What time did you notice it for?

19 MR. ESTEP: 1:00 p.m. The same day as the inspection and I
20 chose that day because I knew Mr. Trischler or a member of his firm
21 would be present for that inspection and could attend the deposition.

22 THE COURT: Understood. What about – what's the means
23 that you were proposing to use to take this deposition?

24 MR. ESTEP: I have called a court reporter, who would report
25 it stenographically, and I have a videographer, who will videotape it.

1 THE COURT: All right. Anything else from your portion of
2 the case?

3 MR. ESTEP: Well, we – I point out too, that we have noticed
4 the deposition in the home at Mr. Peaslee's bedside because, of course,
5 he's confined to home.

6 THE COURT: Yeah.

7 MR. ESTEP: That's local and shouldn't be any problem. I'd
8 suggest that there is absolutely no prejudice to the defendant in simply
9 preserving this testimony. If Mr. Trischler wants to argue later that
10 for whatever reason this ought not to be introduced into evidence, I
11 suppose he's free to argue that. But, we only have one chance to
12 preserve it and I'm not sure at this point we even have that chance
13 anymore. I hope we do but I don't know.

14 THE COURT: Do you have any written statements by your
15 client?

16 MR. ESTEP: No, we have no written statements and he's not –

17 THE COURT: Did he give you any written statements to the
18 EMS people?

19 MR. ESTEP: He did not.

20 THE COURT: Did he give any written statements to the
21 doctors who attended to his care?

22 MR. ESTEP: I am not aware of any written statements period.

23 THE COURT: So the only thing that would be there would be
24 – was he able to verbalize history?

25 MR. ESTEP: I think he probably – probably said something to

1 the EMS folks or to the – to the – to the people in the Emergency
2 Room. Of course, we have those records.

3 THE COURT: And you have their names and contacts?

4 MR. ESTEP: Well, to the extent that they are in the records,
5 we do.

6 THE COURT: Well –

7 MR. ESTEP: The local folks we know. Now when he was
8 taken to Morgantown to the hospital, I don't know those folks and if
9 they are in the medical records then we have them. Here locally, I
10 can identify just about everybody.

11 THE COURT: All right, thank you. Mr. Trischler.

12 MR. TRISCHLER: Yes, sir.

13 THE COURT: As you can tell, this presents a unique dilemma,
14 one that we all hope we never have to face. What – I don't even know
15 that if I were to keep it on the Friday that it will even take place.

16 MR. TRISCHLER: Well, I – I'm sorry if I cut you off, Your
17 Honor, it's hard over the phone to know when everyone is finished
18 talking. If I cut you off, I apologize. I, certainly, agree that the
19 Court's confronted with a unique dilemma and I – and I certainly can
20 tell by the Court's comments that the Court understands the position of
21 both parties and would like to come up with a solution that is – that's
22 fair to both and that's essentially, all that I am asking.

23 Mr. Estep, has indicated that they have 1500 pages of medical
24 records and they've got an EMS report. Certainly, I would have liked
25 those things you know, ten (10) days ago when we first started dealing

1 with this issue. Getting them now, best case probably Wednesday or
2 Thursday, is certainly disadvantageous. There is also the practical
3 problem of -- I just cannot physically be there on the 6th and --

4 THE COURT: Well, what are you doing on Monday?

5 MR. TRISCHLER: Well, I was going -- I don't know because I
6 am speaking on my Blackberry right now which has my calendar and
7 I'm not skillful enough to look it up but I would -- I would even be
8 able -- be willing, Your Honor, if we can get the file materials that Mr.
9 Estep has identified during today's hearing by Thursday. I'd even be
10 willing to do it on -- on Saturday the 7th or Sunday the 8th. I know I'm
11 free those days other than personal things.

12 As long as I have a chance to review what's there and then I -- I
13 would like a chance before the preservation deposition is done to ask
14 Mr. Peaslee what happened. How did this accident occur. And just
15 so I can hear it without having to make the judgment call "cold" on
16 cross-examination that I want to get into that subject with the witness
17 or not. I don't think that would be unfair prejudicial to the plaintiff so
18 if we can get the -- I proposed the 14th but if we can get the medical
19 records as Mr. Estep's indicated, I'd be willing to do it on the 7th, 8th
20 or 9th, if I'm -- if I'm available on the 9th. And the situation is as -- as
21 dire as Mr. Estep has indicated and I have no information one way or
22 the other that suggests that it is or is not. I'd be willing to come down
23 there on the 7th which is just -- we're talking now about moving it back
24 18 hours from when it's noticed so that I can get the information, be
25 there and have an opportunity to question him initially. If his

1 situation remains the same, I doubt that we even have – well, I suspect
2 we'll have competency issues and it will be a very quick – quick day.
3 But, I would like the opportunity to be there myself in – in deference
4 to my client and their wishes and I think their right to have the lawyer
5 that they want there --

6 THE COURT: Sure.

7 MR. TRISCHLER: – and that would clearly going to be an
8 important proceeding.

9 THE COURT: All right. Mr. Estep, and Mr. Trischner, and
10 Mr. Marrion, the Court's going to have to take the bull by the horns
11 using something that a former circuit judge here in this area used to
12 say all the time and I'm going to take up Mr. Trischner on his offer of
13 the 7th at one o'clock in the afternoon for Mr. Peaslee's deposition
14 assuming, he is capable at that point and only you people will be able
15 to determine that, not me.

16 So I'm afraid you are going to have to make the trip, Mr.
17 Trischler, unless, things get so bad that Mr. Estep calls you and tells
18 you that there is no possible way that it can happen on, you know, on
19 any day.

20 So it will be Saturday the 7th at one o'clock at Mr. Peaslee's
21 house. The Plaintiff will supply overnight mail, the 1500 pages of
22 medical, the EMS Report, the names, telephone numbers and addresses
23 of those family members who came after the fact, including, the
24 brother, of the EMS people that are local to Kingwood, and that's to be
25 overnight mail tonight.

1 Mr. Trischler will have between 12:30 and one o'clock in the
2 presence of Mr. Estep to visit with Mr. Peaslee before the start of the
3 one o'clock deposition to have an informal discussion concerning what
4 Mr. Peaslee is able to say happened at the time of the accident and
5 other – other matters that might be pertinent to the deposition. The
6 deposition will be evidentiary. It will be video – it will be taken by a
7 court reporter and videographer. Objections will be by rule number
8 without argument. The Defendant will have the option of deferring or
9 continuing cross-examination but it's all at the Defendant's risk that
10 Mr. Peaslee may not be able to do that at a future date.

11 It is absolutely essential that the Defendant have these medical
12 records, and EMS Report, witnesses and their identities and contact
13 numbers by overnight mail in order for this deposition to go forward.

14 Is any of that impossible for you to perform, Mr. Estep?

15 MR. ESTEP: It is not, Your Honor. I can produce the some
16 1500 pages of medical records I have, understanding there may be
17 something out there that I do not have --

18 THE COURT: Well --

19 MR. ESTEP: – but, certainly, I will give him everything that I
20 do have.

21 THE COURT: I can't ask you to do what you don't have and
22 we just need to take care of this now and see what happens. Don't
23 know that Mr. Peaslee will be able to give a deposition on Saturday
24 but I do appreciate counsel's willingness to take time on the weekend
25 to do this. It is important and we'll see what happens.

1 Is any of that impossible for you to perform given the parameters
2 that I have outlined, Mr. Trischler?

3 MR. TRISCHLER: No, sir.

4 THE COURT: Well, then that will be the **ORDER** of the Court.
5 I will incorporate it in a Memorandum Order, pursuant to the Order of
6 Reference that was sent to me yesterday.

7 MR. ESTEP: Your Honor, if I could add one more thing.

8 THE COURT: Yes, sir, Mr. EStep.

9 MR. ESTEP: I responded to the Court's question as to whether
10 there were any written statements and there are not, at least, not to my
11 knowledge. But, it's occurred to me that if Mr. Peaslee does regain his
12 faculties in the next several days, I may wish to take a recorded
13 statement of him on my own. And if I do that I would – I would give
14 Mr. Trischler notice of my intent to do so and we could take up the
15 matter of its admissibility later.

16 THE COURT: I understand.

17 MR. ESTEP: I just thought I should put that on the record.

18 THE COURT: Well, I understand and that's a future issue as to
19 admissibility and a whole host of other things but at this juncture, I
20 have ruled on the motion that is presently before me. So to some
21 extent the – for the Clerk's notes, the Motion for Protective Order is
22 **GRANTED** because I have set parameters and set a date for the
23 deposition to take place.

24 Now is there anything further I can do for either one of you
25 today?

1 MR. TRISCHLER: On behalf of the Defendant, no, Your
2 Honor, other than if I may ask, I probably should have asked at the
3 outset. Was there a court reporter with us today preparing a transcript
4 or --

5 THE COURT: Oh, absolutely.

6 MR. TRISCHLER: Okay, I was not --

7 THE COURT: This --

8 MR. TRISCHLER: -- I was not sure --

9 THE COURT: All federal courts are courts of record.

10 MR. TRISCHLER: Understood, sir. And since -- since we are,
11 all of today's proceedings have been on the record then I would just
12 indicate for purposes of the record realizing that the issue is not before
13 the Court, that given the representations that have been made regarding
14 Mr. Peaslee's current condition, I would object to any attempt by
15 counsel to obtain an ex-parte statement from him at this point in time
16 to use that prior to the evidentiary deposition on -- on Saturday. I just
17 want to make that -- I didn't want my silence to be construed as any
18 position other than an objection to that suggestion by -- by Plaintiffs
19 and understanding that that's a bridge that we'll cross, if, and when we
20 get there.

21 THE COURT: All right, very good. There being nothing
22 further, this matter will be in recess and somebody should either email
23 my office or call my office and let us know, for no other reason than
24 our own curiosity, to be satisfied as to what happens on Saturday. And
25 the Court's well wishes go with Mr. Peaslee and his family in this